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AUDITOR, Pierce County, WASHINGTON



WASHINGTON STATE DEPARTMENT OF
Natural Resources
Peter Goldmark - Commissioner of Public Lands

AQUATIC LANDS EASEMENT FOR CONSERVATION USES
Sitcum Waterway Remediation Project, Milwaukee Habitat Area

Easement No. 51-087166


Grantor: Washington State Department of Natural Resources
Grantee: Port of Tacoma
Legal Description: Section 33, Township 21 North, Range 03 West, W.M.
Assessor's Property Tax Parcel or Account Number: Not Applicable
Assessor's Property Tax Parcel or Account Number for Upland parcel used in conjunction with this Easement: 8950000121

THIS AGREEMENT is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources ("State"), and the PORT OF TACOMA, a municipal corporation ("Port"). State has authority to enter this Easement under Chapter 43.12 RCW, Chapter 43.30 RCW, and Title 79 of the Revised Code of Washington (RCW).

BACKGROUND

Port desires to use the aquatic lands commonly known as the Milwaukee Habitat Area, which are Bedlands located in Pierce County, Washington, from State for conservation activities intended to preserve and enhance aquatic ecosystems. State is willing to grant an easement for this purpose pursuant to the terms and conditions of this Agreement.

EXCISE TAX EXEMPT DATE 12-14-11
Easement No. 51-087166
Pierce County

By  Auth. Sig

The total habitat area extends within and beyond the State designated Harbor Area. This Agreement applies only to the portion of the habitat area beyond the outer Harbor Line as described in Exhibit A. The portion of the habitat area within the Harbor Area is managed by the Port of Tacoma under Aquatic Lands Management Agreement Port of Tacoma Port Management Agreement No. 20-080007. The portion of the habitat area within the Harbor Area is also subject to an Environmental Covenant signed by the Port, State and United States Environmental Protection Agency. The portion of the habitat area on Port-owned property is subject to an Environmental Covenant signed by the Port and United States Environmental Protection Agency.

The uses authorized under this Easement will not interfere with navigation or access to the Harbor Area.

THEREFORE, the Parties agree as follows:

SECTION 1 GRANT OF EASEMENT

1.1 Easement Defined.

- (a) State grants and conveys to Port a nonexclusive easement, subject to the terms and conditions of this Agreement, over, upon, and under the real property at the Milwaukee Habitat Area, described in Exhibit A. In this Agreement, the term "Easement" means this Agreement and the rights granted; the term "Easement Property" means the real property subject to this Easement.
- (b) This Easement is subject to all valid interests of third parties noted in the records of Pierce County, or on file in the Office of the Commissioner of Public Lands, Olympia, Washington; rights of the public under the Public Trust Doctrine or federal navigation servitude; and treaty rights of Indian Tribes.
- (c) This Easement does not include any right to harvest, collect or damage any natural resource, including aquatic life or living plants, any water rights, or any mineral rights, including any right to excavate or withdraw sand, gravel, or other valuable materials, except as required by monitoring, maintenance, or other requirements under the Consent Decree (as defined in Section 2.1(a) below).
- (d) This Easement does not include the right to grant easements and franchises to third parties.

1.2 Survey and Easement Property Descriptions.

- (a) Port prepared Exhibit A, which describes the Easement Property. Port represents that Exhibit A is a true and accurate description of the Easement boundaries and the improvements to be constructed or already existing in the Easement area. Port's obligation to provide a true and accurate description of the Easement Property boundaries is a material term of this Easement.
- (b) State's acceptance of Exhibit A does not constitute agreement that Port's property description accurately reflects the actual amount of land used by Port. State reserves the right to retroactively adjust fees if at any time during the Term

State discovers a discrepancy between Port's property description and the area actually used by Port.

1.3 Condition of Easement Property. State makes no representation regarding the condition of the Easement Property, improvements located on the Easement Property, the suitability of the Easement Property for Port's Permitted Use, compliance with governmental laws and regulations, availability of utility rights, access to the Easement Property, or the existence of hazardous substances on the Easement Property.

SECTION 2 USE

2.1 Permitted Use.

- (a) Port shall use the Easement Property for conducting the conservation activities under a consent decree concerning Operable Unit 01 of the Commencement Bay Nearshore/Tideflats ("CB/NT") Superfund Site environmental response project entered on October 8, 1993, in the United States District Court for the Western District of Washington in *United States of America, et al. v. Port of Tacoma*, Civil Action No. C93-5462 RJB ("Consent Decree") referenced in Exhibit B (the "Permitted Use"), and for no other purpose.
- (b) Port shall conduct the Permitted Use in accordance with Port's obligations under the Consent Decree. The environmental response project is described in detail in the Administrative Record, which includes but is not limited to:
 - (1) Consent Decree.
 - (2) Record of Decision ("ROD") for the Commencement Bay Nearshore/Tideflats Superfund Site dated September 30, 1989.
 - (3) Explanation of Significant Differences ("ESD") for the Sitcum Waterway Remediation Project dated June 24, 1993.Upon the effective date of this Easement, the Administrative Record is on file with United States Environmental Protection Agency Region 10 or its successor agency, located at 1200 Sixth Avenue, Seattle, WA 98101.
- (c) Port warrants that Easement Property will be available for public recreation purposes in accordance with RCW 79.105.230.
- (d) Port's breach of any warranty under Paragraph 2.1(b) is default subject to Section 14.

2.2 Restrictions on Use.

- (a) The limitations in this Paragraph 2.2 apply to the Easement Property and adjacent state-owned aquatic land. Port's compliance with this Paragraph 2.2 does not limit Port's liability under any other provision of this Easement.
- (b) Port shall not cause or permit:
 - (1) Damage to natural resources,
 - (2) Waste, or

- (3) Deposit of material, unless approved by State in writing. This prohibition includes deposit of fill, rock, earth, ballast, wood waste, refuse, garbage, waste matter, pollutants of any type, or other matter.
- (4) Paragraph 2.2(b)(1)-(3) shall not apply to deposit or removal of material by natural processes such as deposit/sedimentation or erosion.
- (c) State shall not allow other uses on the Easement Property that will interfere with the Permitted Use.

2.3 Conformance with Laws. Port shall keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other government rules and regulations regarding Port's use of the Easement Property.

2.4 Liens and Encumbrances. Port shall keep the Easement Property free and clear of any liens and encumbrances arising out of or relating to its use of the Easement Property, unless expressly authorized by State in writing.

2.5 Interference with Other Uses.

- (a) Port shall exercise Port's rights under this Easement in a manner that minimizes or avoids interference with the rights of State, the public or others with valid right to use or occupy the Easement Property or surrounding lands and water.
- (b) To the fullest extent reasonably possible, Port shall place and construct Improvements in a manner that allows unobstructed movement in and on the waters above and around the Easement Property.
- (c) Except in an emergency, Port shall provide State with written notice of construction or other significant activity on Easement Property at least thirty (30) days in advance. "Significant Activity" means any activity that may affect use or enjoyment by the State, public, or others with valid rights to use or occupy the Easement Property or surrounding lands and water.
- (d) Port shall mark the location and limits of the Improvements. As required by applicable regulation, Port shall facilitate amendment of official navigational charts to indicate existence and location of submerged improvements.

2.6 Additional Provisions Regarding Use, Transfer of Interest, and Inspection. During the Term of this Conservation Easement, the following additional provisions shall also apply:

(a) Uses and Activities. No person shall use the Easement Property in any way that impedes the achievement of objectives for, damages, or disturbs the habitat mitigation project described above without obtaining prior written authorization from the State and the U.S. Environmental Protection Agency ("EPA"). This prohibition includes, but is not limited to, (1) any activity that damages or removes the habitat mitigation project, (2) dredging and excavation, (3) placement of fill.

(b) Notice of Easement in Conveyance. No person shall convey any interest in the Easement Property unless the deed, lease, or other instrument conveying the interest provides notice that the Easement Property is subject to the Consent Decree and is subject to this Conservation Easement.

(c) **Provision for Continued Operation.** No person shall convey any interest in the Easement Property unless the deed, lease, or other instrument conveying the interest provides adequate and complete provision for any continued operation, maintenance, and monitoring of the habitat mitigation project as required by the Consent Decree.

(d) **Notice of Conveyance.** Any person conveying any interest in the Easement Property shall provide thirty (30) days advance written notice to the State, Port, and EPA. Such notice shall include the name and address of the party receiving the interest.

(e) **Inspection.** No person shall prevent authorized representatives of EPA and the Natural Resources Trustees, who are identified in the Consent Decree, from entering the Easement Property at reasonable times in accordance with the Consent Decree to evaluate performance of the habitat mitigation project. No person shall prevent authorized representatives of EPA, the State, and the Port from entering the Easement Property at reasonable times to evaluate compliance with this Easement. The Port shall be entitled to enter the Easement Property at all reasonable times to inspect and monitor the Easement Property.

SECTION 3 TERM

3.1 Term Defined. The term of this Easement is for so long as the Property is used for the Permitted Use (the "Term"), beginning on November 1, 2011 ("Commencement Date"), unless terminated sooner under the terms of this Easement or applicable law.

3.2 End of Term. Upon the expiration or termination of this Easement, Port shall surrender the Easement Property to State in a substantially natural state, except for the alterations authorized by State as a necessary element of the Permitted Use.

SECTION 4 FEES

4.1 Fee. For the Term, Port shall pay to State a one-time fee of Fifty-two Thousand Dollars (\$52,000.00), which is due and payable on or before the Commencement Date. Any payment not paid by State's close of business on the date due is past due. State shall charge no additional fees for this Easement or for the Port's use of the Easement Property for the Permitted Use, except that State may charge and Port shall pay any costs incurred by State arising from the Port's use of the Easement Property.

4.2 Payment Place. Port shall make payment, if any, to Financial Management Division, 1111 Washington St SE, MS 47041, Olympia, WA 98504-7041.

SECTION 5 OTHER EXPENSES

5.1 Utilities. Port shall pay all fees charged for utilities required or needed by the Permitted Use.

5.2 Taxes and Assessments. Port shall pay all taxes, assessments, and other governmental charges, of any kind whatsoever, applicable or attributable to the Easement and the Permitted Use.

SECTION 6 LATE PAYMENTS AND OTHER CHARGES

6.1 Failure to Pay. Failure to pay any fees or other expenses is a default by Port; State may seek remedies in Section 14 as well as late charges and interest as provided in this Section 6.

6.2 Late Charge. If State does not receive any payment within ten (10) days of the date due, Port shall pay to State a late charge equal to four percent (4%) of the unpaid amount then due or Fifty Dollars (\$50), whichever is greater, to defray the overhead expenses of State incident to the delay.

6.3 Interest Penalty for Past Due Fees and Other Sums Owed.

- (a) Port shall pay interest on the past due fee at the rate of one percent (1%) per month until paid, in addition to paying the late charges determined under Paragraph 6.2. Fee not paid by the close of business day on the due date will begin accruing interest the day after the due date.
- (b) If State pays or advances any amounts for or on behalf of Port, Port shall reimburse State for the amount paid or advanced and shall pay interest on that amount at the rate of one percent (1%) per month from the date State notifies Port of the payment or advance. This includes, but is not limited to taxes, assessments, insurance premiums, costs of removal and disposal of unauthorized materials pursuant to Paragraph 2.2 above, costs of removal and disposal of improvements pursuant to Section 7 below, or other amounts not paid when due.

6.4 Referral to Collection Agency and Collection Agency Fees. If State does not receive payment within thirty (30) days of the due date, State may refer the unpaid amount to a collection agency as provided by RCW 19.16.500 or other applicable law. Upon referral, Port shall pay collection agency fees in addition to the unpaid amount.

6.5 No Accord and Satisfaction. If Port pays, or State otherwise receives, an amount less than the full amount then due, State may apply such payment as it elects. No endorsement or statement on any check, any payment, or any letter accompanying any check or payment constitutes accord and satisfaction.

SECTION 7 IMPROVEMENTS

7.1 Improvements Defined.

- (a) “Improvements,” consistent with RCW 79.105 through 79.145, are additions within, upon, or attached to the land. This includes, but is not limited to, structures and fixtures.
- (b) “Personal Property” means items that can be removed from the Easement Property without (1) injury to the Easement Property, adjacent state-owned lands or Improvements or (2) diminishing the value or utility of the Easement Property, adjacent state-owned lands or Improvements.
- (c) “State-Owned Improvements” are Improvements made or owned by State. State-Owned Improvements includes any construction, alteration, or addition to State-Owned Improvements made by Port.
- (d) “Unauthorized Improvements” are Improvements made on the Easement Property by the Port without State’s prior consent or Improvements made by Port that do not conform with plans submitted to and approved by the State.
- (e) “Improvements Owned by Others” are Improvements made by Others with a right to occupy or use the Easement Property or adjacent state-owned lands.

7.2 Existing Improvements. On the Commencement Date, habitat Improvements are located on the Easement Property. Such Improvements were installed by the Port and are authorized under this Easement.

7.3 Construction, Major Repair, Modification, and Demolition.

- (a) Port shall construct no Improvements and make no modification of the Easement Property (“Work”) except as described in Exhibit B.
- (b) Port shall preserve and protect State-Owned Improvements, if any, and Improvements Owned by Others, if any.
- (c) Before completing Work, Port shall remove all debris and restore the Easement Property, as nearly as possible, to a substantially natural state, except for alterations necessary under the Permitted Use or otherwise authorized by State.
- (d) Upon completing Work, Port shall promptly provide State with as-built plans and specifications.

7.4 Standards for Work.

- (a) Port shall not use or install treated wood at any location above or below water on the Easement Property.
- (b) Port shall not use or install tires at any location above or below water on the Easement Property.

7.5 Improvements at End of Term. Improvements installed by Port with State’s approval, including but not limited to the habitat Improvements located on the Easement Property, merge with the Property upon termination of the Easement and may remain on the Property, unless the Parties agree otherwise.

7.6 Disposition of Unauthorized Improvements.

- (a) Unauthorized Improvements belong to State, unless State elects otherwise.
- (b) State may either:
 - (1) Consent to Port ownership of the Improvements, or
 - (2) Charge use and occupancy fee in accordance with RCW 79.105.200 for the Improvements from the time of installation or construction and
 - (i) Require Port to remove the Improvements in accordance with Paragraph 7.3, in which case Port shall pay use and occupancy fee for the Improvements until removal,
 - (ii) Consent to Improvements remaining and Port shall pay use and occupancy fee for the use of the Improvements, or
 - (iii) Remove Improvements and Port shall pay for the cost of removal and disposal, in which case Port shall pay use and occupancy fee for use of the Improvements until removal and disposal.

7.7 Disposition of Personal Property.

- (a) Port retains ownership of Personal Property unless Port and State agree otherwise in writing.
- (b) Port shall remove Personal Property from the Easement Property by the Termination Date. Port is liable for any damage to the Easement Property and to any Improvements that may result from removal of Personal Property.
- (c) State may sell or dispose of all Personal Property left on the Easement Property after the Termination Date.
 - (1) If State conducts a sale of Personal Property, State shall apply proceeds first to the State's administrative costs in conducting the sale, second to payment of amount that then may be due from the Port to the State, and State shall pay the remainder, if any, to the Port.
 - (2) If State disposes of Personal Property, Port shall pay for the cost of removal and disposal.

SECTION 8 ENVIRONMENTAL LIABILITY/RISK ALLOCATION

8.1 Definitions.

- (a) "Hazardous Substance" means any substance that now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination, pollution, or cleanup.
- (b) "Release or threatened release of Hazardous Substance" means a release or threatened release as defined under any law described in Paragraph 8.1(a).
- (c) "Utmost care" means such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances; the standard of care applicable under the Washington State Model Toxics Control Act ("MTCA"), Chapter 70.105 RCW, as amended.

- (d) “Port and affiliates” when used in this Section 8 means Port or Port’s subgrantees, contractors, agents, employees, guests, invitees, licensees, affiliates, or any person on the Easement Property with the Port’s permission.

8.2 General Conditions. Port shall exercise the utmost care with respect to Hazardous Substances on the Easement Property.

8.3 Current Conditions and Duty to Investigate.

- (a) State makes no representation about the condition of the Easement Property. Hazardous Substances may exist in, on, under, or above the Easement Property.
- (b) Port is responsible for conducting all appropriate inquiry and gathering sufficient information about the existence, scope, and location of Hazardous Substances on or near the Property necessary for Port to meet Port’s obligations under this Easement and utilize the Property for the Permitted Use.

8.4 Use of Hazardous Substances.

- (a) Port and affiliates shall not use, store, generate, process, transport, handle, release, or dispose of Hazardous Substances on the Easement Property, except in accordance with all applicable laws.
- (b) Port shall not undertake, or allow others to undertake by Port’s permission, acquiescence, or failure to act, activities that result in a release or threatened release of Hazardous Substances on the Easement Property.
- (c) Port shall provide State with copies of all documents Port submits to any federal, state, or local authorities concerning environmental impacts or proposals relative to the Easement Property. Documents subject to this requirement include, but are not limited to, applications, reports, studies, or audits for National Pollution Discharge and Elimination System Permits; Army Corps of Engineers permits; State Hydraulic Project Approvals (HPA); State Water Quality certification; Substantial Development permit; and any reporting necessary for the existence, location, and storage of Hazardous Substances on the Property.

SECTION 9 ASSIGNMENT

Port shall not assign any part of Port’s interest in this Easement or the Easement Property without State’s prior written consent, which State shall not unreasonably condition or withhold. State reserves the right to reasonably change the terms and conditions of this Easement upon State’s consent to assignment.

SECTION 10 INDEMNITY, FINANCIAL SECURITY, INSURANCE

10.1 Indemnity. Each Party is responsible for the actions and inactions of itself and its own officers, employees, and agents acting within the scope of their authority.

10.2 Insurance Terms.

(a) Insurance Required.

- (1) At its own expense, Port shall procure and maintain during the Term of this Easement, the insurance coverages and limits described in this Paragraph 10.2 and in Paragraph 10.3, Insurance Types and Limits. State may terminate this Easement if Port fails to maintain required insurance.
- (2) Unless State agrees to an exception, Port shall provide insurance issued by an insurance company or companies admitted to do business in the State of Washington and have a rating of A- or better by the most recently published edition of Best's Reports. Port may submit a request to the risk manager for the Department of Natural Resources to approve an exception to this requirement. If an insurer is not admitted, the insurance policies and procedures for issuing the insurance policies must comply with Chapters 48.15 RCW and 284-15 WAC.
- (3) All general liability, excess, umbrella, property, builder's risk, and pollution legal liability insurance policies must name the State of Washington, the Department of Natural Resources, its elected and appointed officials, agents, and employees as an additional insured.
- (4) All insurance provided in compliance with this Easement must be primary as to any other insurance or self-insurance programs afforded to or maintained by State.

(b) Waiver.

- (1) Port waives all rights against State for recovery of damages to the extent insurance maintained pursuant to this Easement covers these damages.
- (2) Except as prohibited by law, Port waives all rights of subrogation against State for recovery of damages to the extent that they are covered by insurance maintained pursuant to this Easement.

(c) Proof of Insurance.

- (1) Port shall provide State with a certificate(s) of insurance executed by a duly authorized representative of each insurer, showing compliance with insurance requirements specified in this Easement and, if requested, copies of policies to State.
- (2) The certificate(s) of insurance must reference additional insureds and the Easement number.
- (3) Receipt of such certificates or policies by State does not constitute approval by State of the terms of such policies.

(d) State must receive written notice before cancellation or non-renewal of any insurance required by this Easement, as follows:

- (1) Insurers subject to RCW 48.18 (admitted and regulated by the Insurance Commissioner): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State forty-five (45) days' advance notice of cancellation or non-renewal.

- (2) Insurers subject to RCW 48.15 (surplus lines): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State thirty (30) days' advance notice of cancellation or non-renewal.
- (e) Adjustments in Insurance Coverage.
 - (1) State may impose changes in the limits of liability for all types of insurance as State deems necessary.
 - (2) Port shall secure new or modified insurance coverage within thirty (30) days after State requires changes in the limits of liability.
- (f) If Port fails to procure and maintain the insurance described above within fifteen (15) days after Port receives a notice to comply from State, State may either:
 - (1) Deem the failure an Event of Default under Section 14, or
 - (2) Procure and maintain comparable substitute insurance and pay the premiums. Upon demand, Port shall pay to State the full amount paid by State, together with interest at the rate provided in Paragraph 6.2 from the date of State's notice of the expenditure until Port's repayment.
- (g) General Terms.
 - (1) State does not represent that coverage and limits required under this Easement are adequate to protect Port.
 - (2) Coverage and limits do not limit Port's liability for indemnification and reimbursements granted to State under this Easement.
 - (3) The Parties shall use any insurance proceeds payable by reason of damage or destruction to Easement Property first to restore the Easement Property, then to pay the cost of the reconstruction, then to pay the State any sums in arrears, and then to Port.

10.3 Insurance Types and Limits.

- (a) General Liability Insurance.
 - (1) Port shall maintain commercial general liability insurance (CGL) or marine general liability (MGL) covering claims for bodily injury, personal injury, or property damage arising on the Easement Property and/or arising out of the Permitted Use and, if necessary, commercial umbrella insurance with a limit of not less than One Million Dollars (\$1,000,000) per each occurrence. If such CGL or MGL insurance contains aggregate limits, the general aggregate limit must be at least twice the "each occurrence" limit. CGL or MGL insurance must have products-completed operations aggregate limit of at least two times the "each occurrence" limit.
 - (2) CGL insurance must be written on Insurance Services Office (ISO) Occurrence Form CG 00 01 (or a substitute form providing equivalent coverage). All insurance must cover liability arising out of premises, operations, independent contractors, products completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another party assumed in a

- business contract) and contain separation of insured (cross-liability) condition.
- (3) MGL insurance must have no exclusions for non-owned watercraft.
- (b) Workers' Compensation.
 - (1) State of Washington Workers' Compensation.
 - (i) Port shall comply with all State of Washington workers' compensation statutes and regulations. Port shall provide workers' compensation coverage for all employees of Port. Coverage must include bodily injury (including death) by accident or disease, which arises out of or in connection with the Permitted Use or related activities.
 - (ii) If Port fails to comply with all State of Washington workers' compensation statutes and regulations and State incurs fines or is required by law to provide benefits to or obtain coverage for such employees, Port shall indemnify State. Indemnity includes all fines; payment of benefits to Port, employees, or their heirs or legal representatives; and the cost of effecting coverage on behalf of such employees.
 - (2) Longshore and Harbor Workers' and Jones Acts. Longshore and Harbor Workers' Act (33 U.S.C. Section 901 et seq.) and/or the Jones Act (46 U.S.C. Section 688) may require Port to provide insurance coverage in some circumstances. Port shall ascertain if such insurance is required and, if required, shall maintain insurance in compliance with law. Port is responsible for all civil and criminal liability arising from failure to maintain such coverage.
- (c) Employers' Liability Insurance. Port shall procure employers' liability insurance, and, if necessary, commercial umbrella liability insurance with limits not less than One Million Dollars (\$1,000,000) each accident for bodily injury by accident or One Million Dollars (\$1,000,000) each employee for bodily injury by disease.

SECTION 11 ROUTINE MAINTENANCE AND REPAIR

11.1 State's Repairs. This Easement does not obligate State to make any alterations, maintenance, replacements, or repairs in, on, or about the Easement Property, during the Term.

11.2 Port's Repairs and Maintenance.

- (a) Routine maintenance and repair are acts intended to prevent a decline, lapse, or cessation of the Permitted Use and associated Improvements as and to the extent required by the Consent Decree.
- (b) At Port's sole expense, Port shall keep and maintain all Improvements installed by Port and the Easement Property as it relates to the Permitted Use in accordance with the Port's obligations under the Consent Decree, and in

accordance with Paragraph 7.4 Standards for Work. State's consent is not required for routine maintenance or repair.

- (c) Port is responsible for any additions, repairs, alterations, maintenance, replacements, or changes to the Easement Property or to any Improvements installed by Port on the Easement Property that any public authority requires because of the Permitted Use.
- (d) Upon completion of maintenance activities, Port shall remove all debris and restore the Easement Property, as nearly as possible, to the condition prior to the commencement of work.

SECTION 12 DAMAGE OR DESTRUCTION

12.1 Notice and Repair.

- (a) In the event of any known damage to or destruction of the Easement Property or any Improvements, Port shall promptly give written notice to State. State does not have actual knowledge of the damage or destruction of the Easement Property or any Improvements without Port's written notice.
- (b) Unless otherwise agreed in writing, Port is responsible for reconstruction or repair of the Property and Improvements as nearly as possible to its condition immediately prior to the damage or destruction in accordance with Section 7 and as may be required by any regulatory authority.

12.2 State's Waiver of Claim. State does not waive any claims for damage or destruction of the Easement Property unless State provides written notice to Port of each specific claim waived.

12.3 Insurance Proceeds. Port's duty to reconstruct or repair any damage or destruction of the Easement Property or any Improvements on the Easement Property is not conditioned upon the availability of any insurance proceeds to Port from which the cost of repairs may be paid. The Parties shall use insurance proceeds in accordance with Paragraph 10.2(g)(3).

SECTION 13 CONDEMNATION

In the event of condemnation, the Parties shall allocate the award between State and Port based upon the ratio of the fair market value of (1) Port's rights in the Easement Property and (2) State's interest in the Easement Property and State-Owned Improvements, if any. In the event of a partial taking, the Parties shall compute the ratio based on the portion of Easement Property or Improvements taken. If Port and State are unable to agree on the allocation, the Parties shall submit the dispute to binding arbitration in accordance with the rules of the American Arbitration Association.

SECTION 14 REMEDIES AND TERMINATION

14.1 Breach.

- (a) State may terminate this Easement upon Port's failure to cure a breach of its terms within sixty (60) days of State's written notice of breach.
- (b) For nonmonetary breach not capable of cure within sixty (60) days, State will not unreasonably withhold approval of a reasonable alternative cure schedule. Port must submit a cure schedule with thirty (30) days of a notice of breach. State shall not terminate if State approves the schedule and Port works diligently and in good faith to execute the cure. State may terminate if Port fails to timely submit a schedule or fails to work diligently and in good faith to execute the cure in accordance with an approved schedule.
- (c) If breach arises from Port's failure to comply with restrictions on Permitted Use under Paragraph 2.2, State may, without terminating this Easement, restore the natural resources or Property and charge Port restoration costs and/or charge Port damages. On demand by State, Port shall pay all costs and/or damages.
- (d) Port may enter the Easement Property at all reasonable times, and may enforce the terms of this Easement by legal proceedings, including but not limited to injunctive relief and the right to require repair or reconstruction of the Easement Property.
- (e) Neither Party shall be in default or violation as to any obligation created hereby and no condition precedent or subsequent shall be deemed to fail to occur if such party is prevented from fulfilling such obligation by, or such condition fails to occur due to:
 - (i) Forces beyond such Party's reasonable control, including without limitation: destruction or impairment of facilities resulting from breakdown not resulting from lack of ordinary care and maintenance; flood; earthquake; tsunami; lahar; slide; natural processes such as deposit/ sedimentation and erosion; storm; lightning; fire; epidemic; war; riot; civil disturbance; sabotage; proceeding by court or public authority; or act or failure to act by court, public authority or third party; or
 - (ii) Any action by either Party deemed reasonable by such Party under emergency conditions to prevent, abate, or mitigate significant injury to the Easement Property resulting from such causes.

14.2 Termination by Nonuse. If Port does not execute the Permitted Use on the Easement Property in the three (3) successive years following the Commencement Date, this Easement terminates without further action by State. Port's rights revert to State upon Termination by Nonuse.

14.3 Remedies Not Exclusive. The remedies specified under this Section 14 are not exclusive of any other remedies or means of redress to which the State and Port are lawfully entitled for breach or threatened breach of any provision of this Easement.

SECTION 15 NOTICE AND SUBMITTALS

Following are the locations for delivery of notice and submittals required or permitted under this Easement. Any Party may change the place of delivery upon ten (10) days written notice to the other.

State: DEPARTMENT OF NATURAL RESOURCES
Aquatic Resources Division
1111 Washington St SE MS 47027
Olympia, WA 98504-7027

Port: PORT OF TACOMA
Real Estate Department
PO Box 1837
Tacoma, WA 98401-1837

EPA: UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 10
Attn: Director
Office of Environmental Cleanup
1200 Sixth Avenue, Suite 900
Seattle WA 98101

The Parties may deliver any notice in person, by facsimile machine, or by certified mail. Depending on the method of delivery, notice is effective upon personal delivery, upon receipt of a confirmation report if delivered by facsimile machine, or three (3) days after mailing. All notices must identify the Easement number. On notices transmitted by facsimile machine, the Parties shall state the number of pages contained in the notice, including the transmittal page, if any.

SECTION 16 MISCELLANEOUS

16.1 Authority. Port and the person or persons executing this Easement on behalf of Port represent that Port is qualified to do business in the State of Washington, that Port has full right and authority to enter into this Easement, and that each and every person signing on behalf of Port is authorized to do so. Upon State's request, Port shall provide evidence satisfactory to State confirming these representations.

16.2 Successors and Assigns. This Easement binds and inures to the benefit of the Parties, their successors, and assigns, and runs with the land until terminated.

16.3 Headings. The headings used in this Easement are for convenience only and in no way define, limit, or extend the scope of this Easement or the intent of any provision.

16.4 Entire Agreement. This Easement, including the exhibits and addenda, if any, contains the entire agreement of the Parties relating to this Easement or to the Easement Property. This Easement merges all prior and contemporaneous agreements, promises, representations, and statements relating to this transaction or to the Easement Property.

16.5 Waiver.

- (a) The waiver of any breach or default of any term, covenant, or condition of this Easement is not a waiver of such term, covenant, or condition; of any subsequent breach or default of the same; or of any other term, covenant, or condition of this Easement. State's acceptance of payment is not a waiver of any preceding or existing breach other than the failure to pay the particular payment that was accepted.
- (b) The renewal of the Easement, extension of the Easement, or the issuance of a new Easement to Port, does not waive State's ability to pursue any rights or remedies under the Easement.

16.6 Cumulative Remedies. The rights and remedies of State and Port under this Easement are cumulative and in addition to all other rights and remedies afforded by law or equity or otherwise.

16.7 Time is of the Essence. TIME IS OF THE ESSENCE as to each and every provision of this Easement.

16.8 Language. The word "Port" as used in this Easement applies to one or more persons, as the case may be. The singular includes the plural, and the neuter includes the masculine and feminine. If there is more than one Port, their obligations are joint and several. The word "persons," whenever used, includes individuals, firms, associations, and corporations. The word "Parties" means State and Port in the collective. The word "Party" means either or both State and Port, depending on context.

16.9 Invalidity. The invalidity, voidness, or illegality of any provision of this Easement does not affect, impair, or invalidate any other provision of this Easement.

16.10 Applicable Law and Venue. This Easement is to be interpreted and construed in accordance with the laws of the State of Washington. Any reference to a statute means that statute as presently enacted or hereafter amended or superseded. Venue for any action arising out of or in connection with this Easement is in the Superior Court for Thurston County, Washington.

16.11 Recordation. At Port's expense and no later than thirty (30) days after receiving the fully-executed Easement, Port shall record this Easement in the county in which the Property is located. Port shall include the parcel number of the upland property used in conjunction with the Property, if any. Port shall provide State with recording information, including the date of recordation and file number.

16.12 Modification. No modification of this Easement is effective unless in writing and signed by the Parties. Oral representations or statements do not bind either Party.

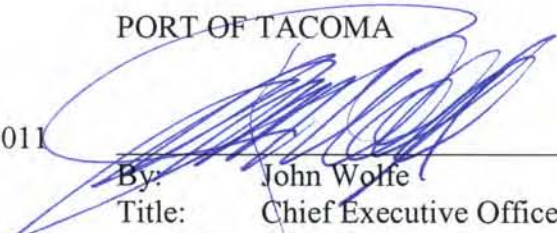
16.13 Survival. Any obligations of Port not fully performed upon termination of this Easement do not cease, but continue as obligations of the Port until fully performed.

16.14 Exhibits. All referenced exhibits are incorporated in this Easement unless expressly identified as unincorporated.

THIS AGREEMENT requires the signature of all Parties and is effective on the date of the last signature below.

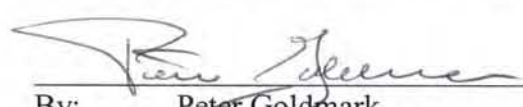
PORT OF TACOMA

Dated: 11/02, 2011


By: John Wolfe
Title: Chief Executive Officer
Address: PO Box 1837
Tacoma, WA 98401-1837
Phone: (253) 383-9402

STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

Dated: 12/5, 2011


By: Peter Goldmark
Title: Commissioner of Public Lands
Address: 1111 Washington St SE
MS 47027
Olympia, WA 98504-7027



Approved as to form this
7th day of October 2011
Janis Snoey, Assistant Attorney General

STATE OF WASHINGTON)
) ss
County of PIERCE)

Dated: 11/02/11
(Seal or stamp)

Judith L. Owens
(Signature)

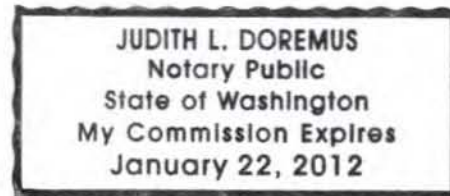
Judith L. Doremus
(Print Name)

Notary Public in and for the State of
Washington, residing at

Pierce County, WA

My appointment expires

1/22/12



STATE OF WASHINGTON)
) ss
County of THURSTON)

Olympia

My appointment expires

7/25/2012

INTRODUCTION TO EXHIBITS

The Easement Property is part of the Milwaukee Habitat Area, which is a habitat mitigation project to compensate for and offset unavoidable environmental impact of the Sitcum Waterway Remediation Project.

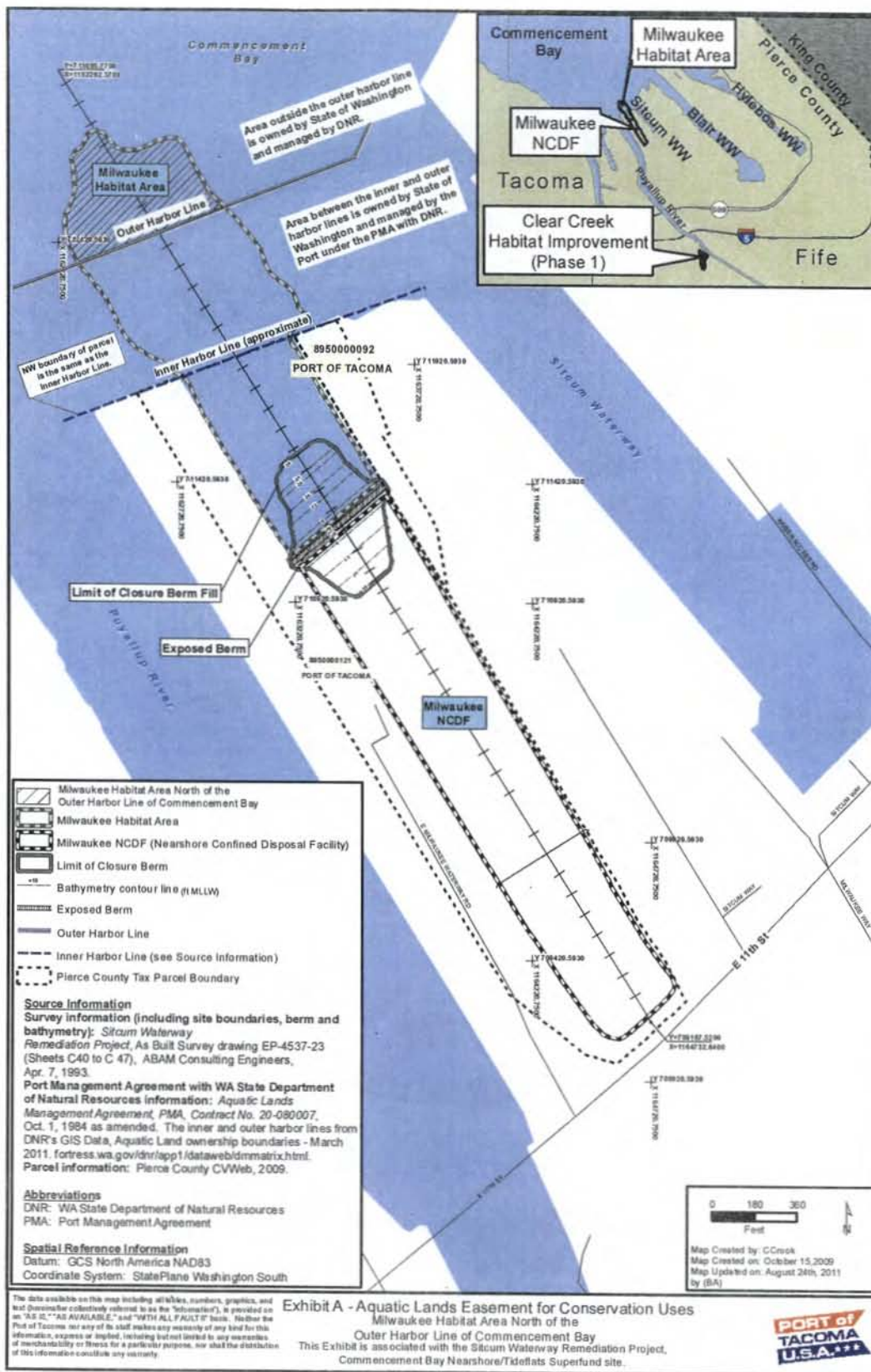
The complete mitigation project consists of three contiguous parcels, each under distinct management regimes. This Conservation Easement is only for the portion of the mitigation project beyond the outer Harbor Line in Commencement Bay, which is located on property owned by the State of Washington. It is intended that a separate Environmental Covenant signed by the State, the Port, and EPA will apply to the portion of the Milwaukee Habitat Area located on property owned by the State within the Port Management Area, and a separate Environmental Covenant signed by EPA and Port will apply to the portion of the Milwaukee Habitat Area located on property owned by the Port of Tacoma.

The portion of the Milwaukee Habitat Area located on property owned by the State of Washington beyond the outer Harbor Line in Commencement Bay is shown in the drawing and legal description contained in Exhibit A on pages 21 through 24 below.

EXHIBIT A

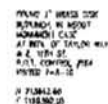
Legal Description of Premises and Encumbrances

Current Survey recorded with Pierce County
Auditor's File No. 201110125001
12th day of October 2011



SITCUM WATERWAY REMEDIATION PROJECT, MILWAUKEE HABITAT AREA

A PORTION OF THE BEDLANDS OF COMMENCEMENT BAY LYING IN FRONT OF THE HARBOR AREA LYING IN FRONT OF TRACTS 7 AND 8, AND VACATED YOKOHAMA STREET, TACOMA TIDELANDS
PIERCE COUNTY, WASHINGTON.



LAME TABLE		
LINE	LOC	Value
11	17.05	925.0000
12	17.06	883.3300
13	17.07	841.6600
14	17.08	800.0000
15	17.09	758.3300
16	17.10	716.6600
17	17.11	675.0000
18	17.12	633.3300
19	17.13	591.6600
20	17.14	550.0000
21	17.15	508.3300
22	17.16	466.6600
23	17.17	425.0000
24	17.18	383.3300
25	17.19	341.6600
26	17.20	300.0000
27	17.21	258.3300
28	17.22	216.6600
29	17.23	175.0000
30	17.24	133.3300
31	17.25	91.6600
32	17.26	50.0000
33	17.27	8.3300
34	17.28	-33.3300
35	17.29	-75.0000
36	17.30	-116.6600
37	17.31	-158.3300
38	17.32	-200.0000
39	17.33	-241.6600
40	17.34	-283.3300
41	17.35	-325.0000
42	17.36	-366.6600
43	17.37	-408.3300
44	17.38	-450.0000
45	17.39	-491.6600
46	17.40	-533.3300
47	17.41	-575.0000
48	17.42	-616.6600
49	17.43	-658.3300
50	17.44	-700.0000
51	17.45	-741.6600
52	17.46	-783.3300
53	17.47	-825.0000
54	17.48	-866.6600
55	17.49	-908.3300
56	17.50	-950.0000
57	17.51	-991.6600
58	17.52	-1033.3300
59	17.53	-1075.0000
60	17.54	-1116.6600
61	17.55	-1158.3300
62	17.56	-1200.0000
63	17.57	-1241.6600
64	17.58	-1283.3300
65	17.59	-1325.0000
66	17.60	-1366.6600
67	17.61	-1408.3300
68	17.62	-1450.0000
69	17.63	-1491.6600
70	17.64	-1533.3300
71	17.65	-1575.0000
72	17.66	-1616.6600
73	17.67	-1658.3300
74	17.68	-1700.0000
75	17.69	-1741.6600
76	17.70	-1783.3300
77	17.71	-1825.0000
78	17.72	-1866.6600
79	17.73	-1908.3300
80	17.74	-1950.0000
81	17.75	-1991.6600
82	17.76	-2033.3300
83	17.77	-2075.0000
84	17.78	-2116.6600
85	17.79	-2158.3300
86	17.80	-2200.0000
87	17.81	-2241.6600
88	17.82	-2283.3300
89	17.83	-2325.0000
90	17.84	-2366.6600
91	17.85	-2408.3300
92	17.86	-2450.0000
93	17.87	-2491.6600
94	17.88	-2533.3300
95	17.89	-2575.0000
96	17.90	-2616.6600
97	17.91	-2658.3300
98	17.92	-2700.0000
99	17.93	-2741.6600

CURVE	LEG IN	PAVING	DELTA
01	175.00	180.00	20.00
02	180.00	200.00	20.00

DNR APPLICATION #51-087166

RECORD OF SURVEY
FOR
PORT OF TACOMA

$$\text{LiAlH}_4 + \text{H}_2\text{O} \rightarrow \text{LiOH} + \text{H}_2$$

DATE 06/24/2011

DRARY BY TIME

1991

20110125001

SHEET 2 OF 2

JOB NO. 3284

Apex
Engineering

2601 Soyuz, 26th, Suite 2
Indianapolis, Washington 28409-14

TEL: (232) 473-4404 FAX: (232) 473-4700

EXHIBIT B

PERMITTED USE / PLAN OF OPERATIONS

1. DESCRIPTION OF PERMITTED USE

A. Existing Conditions.

The Easement Property is part of the Milwaukee Habitat Area, which is a habitat mitigation project to compensate for and offset unavoidable environmental impact of the Sitcum Waterway Remediation Project. The complete mitigation project consists of three contiguous parcels, each under distinct management regimes. This Conservation Easement is only for the portion of the mitigation project beyond the outer Harbor Line in Commencement Bay. The full area includes this parcel, a parcel between the inner and outer Harbor Lines, and a parcel on Port tidelands.

B. Proposed Conditions.

The mitigation project has been deemed complete by EPA. No further action is anticipated on the Property. Any further activities can be conducted by the Port with thirty (30) days notice to DNR. Inspection and monitoring can be conducted at reasonable times without prior notice under Sections 2.6(e) and 14.1(d). Emergency actions are authorized under Sec. 12.1.b.

2. ADDITIONAL OBLIGATIONS

A. Restrictions On Use.

No further actions are authorized on the Property. The Port may not conduct or authorize any action which disturbs or damages the Property. Any future use for the Property will be reviewed by DNR and EPA for compatibility with the existing use. Institutional controls related to the Property must be authorized by DNR.

B. Consent Decree

The Consent Decree applicable to the Property, *Commencement Bay Nearshore/Tideflats Superfund Site; Sitcum Waterway Problem Area*, entered on October 8, 1993, in the United States District Court for the Western District of Washington, in United States of America, et al., v. Port of Tacoma, Civil Action No. C93-5462 RJB ("Consent Decree"), is on file at the Port office and available through EPA. A copy of the Consent Decree is attached to this agreement. The full Consent Decree is not required to be recorded with this document. A recording page is provided for that purpose.

ATTACHMENT 1 TO EXHIBIT B

In the United States District Court for the Western District of Washington

United States of America, on behalf of the United States Environmental Protection Agency, the United States Department of the Interior, and the National Oceanic and Atmospheric Administration; State of Washington; Puyallup Tribe of Indians; Muckleshoot Indian Tribe; Plaintiffs, v. Port of Tacoma, Defendant

Civil No. C93-5462 RJB: Commencement Bay Nearshore/Tideflats Superfund Site; Sitcum Waterway Problem Area Consent Decree

Entered on October 8, 1993; 156 pages